OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 02-09 September 20, 2002

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Arthur F. Rosenfeld, General Counsel

SUBJECT: Case Handling Instructions for Cases Concerning *Bill Johnson's Restaurants* and *BE&K Construction Co.*

This memorandum sets forth instructions for cases that raise issues concerning *Bill Johnson's Restaurants, Inc. v. NLRB*[1] and the Supreme Court's recent decision in *BE & K Construction Company v. NLRB.*[2]

These cases address the circumstances under which the Board may find a lawsuit to be an unfair labor practice. In analyzing this issue the courts and the Board have distinguished whether the suit was "ongoing" or "concluded." In Bill Johnson's Restaurants, the Court held that the Board may find the prosecution of an ongoing lawsuit unlawful if the suit lacks a reasonable basis in fact or law and was brought with a retaliatory motive.[3] The Court also dealt with the circumstances in which the Board might find a concluded suit to be an unfair labor practice. It explained that if the concluded proceedings result in a judgment adverse to the plaintiff, or if the suit was withdrawn or otherwise shown to be without merit, then the Board could proceed to find a violation if the suit was filed with a retaliatory motive.[4] In determining whether the suit had been filed in retaliation for the exercise of the employees' Section 7 rights, the Board could take into account that the suit lacked merit.[5]

After *Bill Johnson's,* the Board's policy with respect to ongoing suits evidenced a preference for awaiting the outcome of the litigation. Thus, in *Beverly Health & Rehabilitation Services, Inc.*, 331 NLRB No. 121 (2000), the Board directed that the unfair labor practice charge be held in abeyance pending the conclusion of the suit because the evidence presented questions of the proper inferences to be drawn from undisputed facts. To do otherwise, the Board concluded would deprive the plaintiff of its First Amendment right to have state law questions decided by the state court judicial system. 331 NLRB No. 121, slip op. at 3.

Such an approach accomodated the plaintiff's First Amendment rights and the interests of comity while preserving the Board's interest in remedying unfair labor practices. For, under the *Bill Johnson's* Court's discussion of concluded suits, the Board would be free to find the suit unlawful if, at the end of the state court litigation, the suit was found non-meritorious and the Board found it was brought with a retaliatory motive.

BE & K Construction Company involved a completed lawsuit. Applying the "concluded suit" standard of *Bill Johnson's*, the Board found the suit was "unmeritorious" since all of the petitioner's claims were rejected by the district court on the merits, or were voluntarily withdrawn with prejudice.[6] The Board then concluded that retaliatory motive could be inferred from the following factors: the petitioner's federal suit was "by its terms" directed at the conduct that the Board had found was protected under Section 7[7] and the suit "necessarily tended to discourage similar protected activity;" the lawsuit's attempt to have the district court impose liability on unions that had not engaged in the conduct at issue indicated that petitioner "was interested only in harassing the Unions, not in obtaining justice;" and certain of the petitioner's claims suffered from an "utter absence of merit."[8]

On writ of certiorari, the Supreme Court viewed the Board as having adopted a standard of finding retaliatory motive if the plaintiff acted with a subjective motive to interfere with activity protected under the Act. It unanimously rejected this standard for finding retaliatory motive in non-meritorious, but reasonably based, cases, announcing that its prior statement in *Bill Johnson's* regarding concluded suits was dicta.[9] It explained that a non-meritorious lawsuit may be reasonably based even though it is ultimately unsuccessful. Even though the suit may attack activity that is ultimately determined to be protected, the suit nevertheless enjoys First Amendment protection if the plaintiff reasonably believes the conduct is unprotected and illegal.[10] Similarly, the Court reasoned that inferring a retaliatory motive from evidence of animus would condemn genuine

petitioning in circumstances where the plaintiff's "purpose is to stop conduct he reasonably believes is illegal."[11] For the Court, then, the Board's retaliatory motive standard incorrectly "broadly covers a substantial amount of genuine petitioning."[12]

Although the Court unanimously rejected the Board's approach as overbroad, it was significantly divided as to the implications of its holding. Seven Justices left open whether any circumstances would permit the Board to find a reasonably based but unsuccessful suit to be an unfair labor practice because it is retaliatory. Justice O'Connor, writing for the Court, explicitly stated, "We do not decide whether the Board may declare unlawful any unsuccessful but reasonably based suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA protected activity. . . ."[13] Justice Breyer, in a concurring opinion joined by Justices Stevens, Souter and Ginsburg, also suggested there might be circumstances in which the "evidence of 'retaliation' or antiunion motive might be stronger or different" than that found insufficient in *BE&K*. He noted not only the possible retaliatory motive standard suggested by Justice O'Connor but also suits brought as "part of a broader course of conduct aimed at harming the unions and intefering with employees' exercise of their rights under §7. . . ."[14] Justice Scalia, however, in a concurring opinion joined by Justice Thomas, indicated that he would apply the *Professional Real Estate Investors* test to the NLRA and preclude the Board from finding a suit unlawful unless it was both objectively baseless and subjectively intended to abuse process.[15]

While the full implications of *BE & K* will only be discerned through individual cases over time, it is clear that the Court's decision will affect the treatment of both "reasonable basis" and retaliatory motive. First, *BE&K* concerned a lawsuit that, although ultimately non-meritorious, was, in the Court's view, reasonably based. The Court did not discuss how, if at all, its analysis of retaliatory motive in that context affects the Board's retaliatory motive analysis with respect to baseless suits.[16] Second, given the Court's rejection of the previously sanctioned approach to concluded suits, the Board can no longer be satisfied with determining merely that the suit ultimately proved non-meritorious, before turning to an analysis of retaliatory motive. Rather, even with respect to concluded suits, the Board must determine whether the suit was baseless or reasonably based.

Based on the foregoing, Regions are directed to take the following approach regarding charges alleging that a lawsuit is an unfair labor practice.

When the Region receives a charge alleging that an ongoing lawsuit is unlawful, it should investigate whether the suit is arguably reasonably based and whether it is arguably brought with a retaliatory motive.[17] If it is both, the Region should hold the unfair labor practice charge in abeyance as it is often difficult to decide definitively at an early stage of litigation whether a suit is reasonably based. Thus, the pleadings may not disclose the full scope of the litigation and, during the unfair labor practice investigation, charged parties may not fully cooperate in disclosing the legal and evidentiary support for their lawsuit. Given these difficulties, we conclude it is more prudent to hold cases in abeyance at the early stage of litigation.

If the Region believes that the suit is arguably reasonably based but not arguably retaliatory, and would thus warrant dismissal, it should nevertheless submit the case to Advice. The Office of the General Counsel should be directly involved in formulating a position on what constitutes retaliatory motive, given the importance of the First Amendment and Section 7 policy issues involved.

If the Region believes the lawsuit is not arguably reasonably based, the Region should conduct a full investigation of the case, including the retaliatory motive issue, and submit it to Advice.[18]

As to cases held in abeyance, if, at the conclusion of the suit, the charged party wins, the charge should be dismissed. If the suit is dimissed on the merits or otherwise disposed of adversely to the plaintiff, however, the Region should conclude its investigation regarding whether the suit was reasonably based or baseless and whether it was brought with a retaliatory motive and should submit the unfair labor practice case to Advice.

/s/
A.F.R.

cc: NLRBU
Release to the Public

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[1] 461 U.S. 731 (1983).

[2] 122 S. Ct. 2390 (2002).

[3] 461 U.S. at 731, 742-743.

[4] Id. at 747, 749.

[5] Id. at 747.

[6] 329 NLRB 717, 722-723 (1999)

[7] The conduct at issue included lobbying for the adoption and enforcement of environmental standards, picketing and striking, suits under health and safety codes and grievances against a joint venture partner of the plaintiffs. See. 122 S. Ct. at 2393.

[8] 329 NLRB at 726-727.

[9] 122 S. Ct. at 2400, 2397.

[10] 122 S. Ct. at 2399-2401, citing *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993) (suit may be condemned as violative of anti-trust Act only if it is objectively baseless, in the sense that no reasonable litigant could realistically expect success on the merits, and it is subjectively a sham attempt to use government process - as opposed to the outcome of the process - as an anti-competitive weapon)

[11] 122 S. Ct. at 2401 (emphasis in original).

[12] 122 S. Ct. at 2400.

[13] 122 S. Ct. at 2402.

[14] 122 S. Ct. at 2403.

[15] 122 S. Ct. at 2402-3

[16] We do not read *BE&K* to alter the Board's power to enjoin a baseless suit that has a retaliatory motive. Nor do we read *BE&K* to affect the analysis outlined in *Bill Johnson's* footnote 5 regarding preempted lawsuits (see, e.g., *Manno Electric, Inc.*, 321 NLRB 278 (1996)) or those filed with an unlawful objective (see, e.g., *Long Elevator & Machine Co., Inc.*, 289 NLRB 1095 (1988)).

[17] The standard for determining "arguable" in this context should be similar to the standard applied in determining whether or not to defer cases under *Collyer Insulated Wire*, 192 NLRB 837 (1971).

[18] Consistent with GC Memorandum 02-03, Regions should also submit to the Division of Advice cases that involve preempted lawsuits or those filed with an illegal objective. See n.16, above.